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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. JOSE BADAJOZ, Defendant and Appellant.	B208300 (Los Angeles County Super. Ct. Nos. BA297321 & BA298825)

APPEAL from a judgment of the Superior Court of Los Angeles County, Marcelita Haynes, Judge. Affirmed.

Ramiro J. Lluis for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., and Jaime L. Fuster, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant guilty in counts 1 and 2 of receiving stolen property—NASCAR die cast model cars and JC Penney rugs. (Pen. Code, § 496, subd. (a).)[1] In count 4, defendant was convicted of the unlawful driving of a motor vehicle, a Kenworth Tractor and an attached Hyndai trailer. (Veh. Code, § 10851, subd. (a).)[2] In count 6, defendant was convicted of the cargo theft of a shipment of Coca-Cola beverages. (§ 487h, subd. (a).) The jury specially found the taking of the NASCAR models, the tractor-trailer, and the beverage shipment each resulted in losses of more than $50,000. (§ 12022.6, subd. (a).)[3] After defendant waived his trial rights, the court found true the special allegation that he committed counts 4 and 6 while released on bail. (§ 12022.1.) The court imposed a five year prison term consisting of the two-year middle term on count 6, plus one year for the section 12022.6 excessive taking enhancement and two years for the section12022.1 out-on-bail enhancement. Concurrent terms were imposed on counts 1 and 4. Count 2 was dismissed based on the court's finding that the underlying conduct comprised the same conduct alleged in count 1.

In his timely appeal, defendant contends (1) the trial court improperly joined charges for vehicle taking and cargo theft (counts 4-6) with the receiving stolen property counts involving the model cars and rugs (counts 1 and 2), further contending the joinder violated his federal constitutional rights to due process and a fair trial, (2) there was constitutionally insufficient evidence in support of his conviction for receiving the stolen model cars, and (3) he was entitled to the retroactive benefit of an amendment to section 12022.6, subdivision (a), which increased the threshold for the property loss enhancement from $50,000 to $65,000. We affirm.

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[1] All further statutory citations are to the Penal Code, except as noted otherwise.

[2] The jury acquitted defendant of the grand theft and unlawful driving of the tractor-trailer, alleged in count 3.

[3] Count 7, which charged defendant with receiving stolen property (pet food and furniture) was dismissed pursuant to section 1385 following the declaration of a mistrial.

STATEMENT OF FACTS

Counts 1 and 2 (NASCAR model cars and JC Penney Rugs)

On January 11, 2006, at approximately 10:30 p.m., the Kamino International Transport storage lot was closed for the day and locked. Sometime before 5:50 the next morning, a cargo container holding 1,416 cases of die-cast metal NASCAR replica cars worth $192,000 was stolen from the premises. On January 22, 2006, unknown persons broke into the Amrapur shipment and distribution center in Garden Grove and stole three locked and secured trailers, one of which contained JC Penny rugs valued at $47, 866.

On January 26, 2006, Detective Feliberto Navarro of the California Highway Patrol was conducting surveillance at the Del Rancho Produce warehouse on Hawkings Circle in Huntington Park, which was owned by Victor Flores. The refrigerated warehouse mainly stored produce for distribution to stores, markets, and restaurants. At approximately 9:00 a.m., Detective Navarro had detained Javier "La Changa" Fernandez and Carlos "Gaby" Sanchez, after seeing them engaged in counter-surveillance driving around the parking lot adjacent to the Del Rancho warehouse. Some 45 minutes later, the detective saw defendant drive a white bobtail truck—a large vehicle designed to transport merchandise—to the warehouse and back up to a loading dock. Defendant exited the truck and entered the warehouse through an open bay door, while speaking on a cell phone. Defendant, who wore a red cap, began loading boxes from the warehouse into his truck.

Detective Navarro and other officers taking part in the surveillance entered the warehouse. One of the refrigerated sections of the warehouse was filled with more than 1,000 clearly marked boxes of NASCAR model cars. Thirty-seven boxes of the cars had been loaded into the truck driven by defendant. The officers found boxes of JC Penny throw rugs in the same section of the warehouse and also in an adjoining refrigerated section. Other boxes of rugs were found outside the refrigerated units alongside boxes of the model cars. Detective Navarro found it suspicious that the model cars and rugs were

being stored in refrigerated units within a produce warehouse. It appeared that someone had attempted to conceal the model car boxes by placing produce boxes in front of them. Defendant was arrested at the scene. The officers found some NASCAR model cars in Flores's office. Detective Rick Finley responded to the scene and parked in front of the driveway where defendant had parked his bobtail truck. The detective saw defendant inside the truck, holding a brown box.

Defendant had telephoned Flores earlier that morning to say that he was going to come by the warehouse "to do something." According to Detective Navarro, Flores admitted that defendant said he "was there to pick up some of the NASCAR cars." Flores was arrested and booked. Before being released, Flores admitted knowing the property was stolen. He was convicted of misdemeanor receiving stolen property.

The model cars in defendant's truck were valued at $5,066, with the models in the one unit of the warehouse valued at $145,183 and the ones in the other unit valued at $10,132.

Counts 4 through 6 (Tractor-Trailer and Cargo Theft of Coca-Cola Beverages)

The Garcia Express shipping company employed Hector Landeros to drive its tractor-trailers or "18-wheelers." On approximately January 31, 2006, Landeros parked and locked his Kenworth tractor-trailer on Dalewood Street in Baldwin Park after work, in an area where trucks are typically parked. The tractor-trailer was valued at $52,000 and its trailer contained 22 pallets of Coca-Cola beverage products valued at $57,575, which were to be delivered to a Las Vegas destination. Two days later, Landeros returned to find the truck missing. Landeros immediately reported the theft to the police.

Araceli Garcia and her husband owned Garcia Express. On February 3, 2006, after hearing from Landeros that his tractor-trailer was missing, Garcia had the global positioning system (GPS) activated for that truck and passed on the information concerning the truck's whereabouts to the police. At 8:21 a.m., the GPS showed the truck was on Schabarum Avenue in Baldwin Park. Landeros drove to that location , and

then drove to his brother's home, which was 10 minutes away, to pick up his brother to have him drive Landeros's car, while Landeros drove the tractor trailer to a safer location. On his drive back to get the tractor-trailer, he saw defendant, wearing a red cap, driving the 18-wheeler in the opposite direction. Landeros tried to follow, but lost sight of the vehicle as it entered the 605 freeway southbound.

Mario Andrade was working near Wall Street and Slauson in Los Angeles. He saw defendant driving Landero's tractor-trailer in the wrong direction on Slauson as it turned onto Wall Street. Defendant parked the truck in a nearby pallet yard. Two or three persons exited the tractor and began to run away; Andrade could not tell whether one was defendant. There were 22 pallets of Coca-Cola energy drinks inside the trailer. The tractor-trailer's movements were confirmed by the GPS reports. GPS tracking showed the tractor-trailer stopped at the Los Angeles location where Andrade saw it park at 10:52 a.m.

Officer Matthew Gray cited defendant for a traffic violation that same morning at Vinevale and Florence in the City of Bell. The officer issued the ticket at 11:28 a.m., according to his notation on the ticket. The officer likely pulled defendant over five minutes before the time shown on the citation. Officer Chris Pendleton testified it would take 19 minutes to drive the six miles from the pallet yard to the location where defendant was cited.

Defense

When Landeros described the driver of the stolen tractor-trailer to Garcia, he did not mention a red cap. Detective Navarro spoke to Officer Gray about defendant's traffic citation. Officer Gray said he had been on duty between 10:00 and 11:30 a.m. on February 3, 2006. He stopped defendant and four others at the same time for the same moving violation, and cited each of them. According to private investigator Lawrence Murillo, it took between 20 and almost 30 minutes to drive the distance to the pallet yard from the location where defendant was cited.

DISCUSSION

Consolidation

The underlying claims were originally contained in two felony informations. The trial court granted the prosecution's pretrial motion to join the claims in a single prosecution. Defendant contends the court improperly joined the receiving stolen property counts involving the model cars and rugs (counts 1 and 2) with the counts for vehicle taking and cargo theft (counts 4-6). He also argues the consolidation order violated his federal constitutional rights to due process and a fair trial. We disagree.

Section 954 provides in pertinent part: "An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated. . . . [T]he court . . . , in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts . . . be tried separately. . . ." As our Supreme Court recently explained, "because consolidation or joinder of charged offenses ordinarily promotes efficiency, that is the course of action preferred by the law." (*Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1220 (*Alcala*).)

The parties agree that consolidation of the challenged counts was statutorily permissible because the charges were of the same class of crimes. Where the statutory criteria for joinder are present, petitioner can establish error in the trial court's ruling allowing joint trial only by clearly showing the trial court abused its discretion in granting the prosecution's consolidation motion. (See *Alcala, supra,* 43 Cal.4th at p. 1220 [ruling on denial of defense motion to sever].) We must therefore assess whether the trial court's ruling amounted to a prejudicial abuse of discretion in the sense that the trial court's ruling fell outside the bounds of reason and, in so doing, "we consider the record before the trial court when it made its ruling." (*Ibid.*) "'The factors to be considered are these:

(1) the cross-admissibility of the evidence in separate trials; (2) whether some of the charges are likely to unusually inflame the jury against the defendant; (3) whether a weak case has been joined with a strong case or another weak case so that the total evidence may alter the outcome of some or all of the charges; and (4) whether one of the charges is a capital offense, or the joinder of the charges converts the matter into a capital case.' [Citations.] 'The state's interest in joinder gives the court broader discretion in ruling on a motion for severance than it has in ruling on admissibility of evidence.'" (*Id.* at pp. 1220-1221.)

Applying these standards, the pretrial ruling granting joinder was correct when made, as defendant fails to make the requisite showing of prejudice. Given that defendant was seen wearing a red cap while loading the bobtail truck with stolen NASCAR models on January 26, 2006, and while driving the Garcia Express 18-wheeler containing the stolen shipment of Coca-Cola beverages only a week later, there was cross-admissible evidence. As the trial court found, this evidence was relevant and cross-admissible to show the relevant mental state—that defendant knew the property was stolen. (See *Alcala, supra*, 43 Cal.4th at p. 1226 [concluding the evidence linking petitioner to all five charges supported the reasonable inference that the perpetrator probably harbored the same intent in each instance].) "[I]f evidence underlying the offenses in question would be 'cross-admissible' in separate trials of other charges, that circumstance normally is sufficient, standing alone, to dispel any prejudice and justify a trial court's refusal to sever the charged offenses." (*Id.* at p. 1221.)

Moreover, none of the joined charges was likely to inflame the jurors' passions. They were all the same type of property-related, nonviolent offenses. Nor did consolidation have the effect of joining a weak case with a strong case. The evidence on counts 1 and 2 was not appreciably stronger than that on counts 4 and 6. As such, defendant's reliance on *People v. Grant* (2003) 113 Cal.App.4th 579 in support of his due process argument is misplaced. There, the court found it highly probable the jury would draw the impermissible conclusion that defendant committed one crime because he "'did

it before,'" where the evidence on two counts was similar, but considerably stronger on one count than the other. (*Id.* at p. 593.)

In sum, the there was no prejudicial error in the trial court's consolidation order and no basis for asserting a constitutional violation thereon.

Sufficiency of Evidence

Defendant contends the prosecution failed to present constitutionally sufficient evidence of an essential element of the offense of receiving stolen property in count 1—that he knew the NASCAR models were stolen. As we explain, there was solid, persuasive, and credible evidence to support the inference of guilty knowledge.

"In reviewing a challenge of the sufficiency of evidence, we 'consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment. . . . The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt.' (*People v. Mincey* (1992) 2 Cal.4th 408, 432; see *People v. Hayes* (1990) 52 Cal.3d 577, 631.) Our sole function is to determine if '*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; see *People v. Bolin* (1998) 18 Cal.4th 297, 331 (*Bolin*); *People v. Marshall* (1997) 15 Cal.4th 1, 34.) The standard of review is the same in cases where the prosecution relies primarily on circumstantial evidence. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11; *People v. Stanley* (1995) 10 Cal.4th 764, 792; *People v. Bloom* (1989) 48 Cal.3d 1194, 1208.) The California Supreme Court has held, '[r]eversal on this ground is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]."' (*Bolin, supra,* 18 Cal.4th at p. 331, quoting *People v. Redmond* (1969) 71 Cal.2d 745, 755.)" (*People v. Zambia* (2009) 173Cal.App.4th 1221, 1225.)

"[T]o sustain a conviction for receiving stolen property, the prosecution must prove (1) the property was stolen; (2) the defendant knew the property was stolen; and, (3) the defendant had possession of the stolen property. [Citations.] [¶] . . . Possession of the stolen property may be actual or constructive and need not be exclusive. [Citations.] Physical possession is also not a requirement. It is sufficient if the defendant acquires a measure of control or dominion over the stolen property." (*People v. Land* (1994) 30 Cal.App.4th 220, 223-224, fn. omitted; see § 496, subd. (a).)

As we have explained: "Although knowledge that property has been stolen can seldom be proved by direct evidence [citation], 'possession of stolen property, accompanied by no explanation or unsatisfactory explanation, . . . will justify an inference that the goods were received with knowledge that they were stolen. Corroboration need only be slight and may be furnished by conduct of the defendant tending to show his guilt.'" (*People v. Shope* (1982) 128 Cal.App.3d 816, 821.) Analogously, "[w]hen . . . a defendant is found in possession of property stolen in a burglary shortly after the burglary occurred, the corroborating evidence of the defendant's acts, conduct, or declarations tending to show his guilt need only be slight to sustain the burglary convictions." (*People v. Mendoza* (2000) 24 Cal.4th 130, 176; see also *People v. Hughes* (2002) 27 Cal.4th 287, 357 [where defendant possesses recently stolen property, a robbery conviction requires only slight corroborative evidence of other inculpatory circumstances which tend to show guilt possession].)

The circumstantial evidence of defendant's guilty knowledge was strong. Minutes before defendant arrived at the produce warehouse, Sanchez and Fernandez were seen engaging in counter-surveillance driving in the parking area adjacent to the warehouse. The warehouse's primary function was to house produce. The boxes of NASCAR model cars, which were clearly marked as such, had been placed in refrigerated units and partially hidden by boxes of produce at the time defendant was loading the stolen merchandize into his truck. The only property in defendant's truck was boxes of stolen model cars. Indeed, defendant had called the warehouse owner that morning, telling him that he was going to pick up the model cars. Detective Navarro testified from his

experience that it was highly suspicious to have nonperishable items stored in refrigerated warehouse units. Certainly, no legitimate explanation was offered for defendant's possession of the stolen goods and no reason to infer that defendant thought he was legitimately transporting produce. Finally, as pointed out *ante*, the fact that defendant was seen one week later driving a stolen tractor-trailer containing a shipment of stolen goods tends to show he was engaged in a similar course of illegal conduct.

In sum, the evidence of guilty knowledge was more than sufficient under the constitutional standards set forth in *People v. Johnson, supra,* 26 Cal.3d at page 578 and *Jackson v. Virginia, supra*, 443 U.S. at pages 317-320.

Section 12022.6 Enhancement

Section 12022.6, subdivision (a), provides for enhanced punishment "[w]hen any person takes, damages, or destroys any property in the commission or attempted commission of a felony, with the intent to cause that taking, damage, or destruction . . . ." The length of the enhancement is keyed to the dollar amount of loss suffered by the victim. At the time defendant committed the underlying offenses, the statute's threshold amount for the one-year penalty was $50,000. By the time of trial in February 2008, however, section 12022.6 had been amended to increase that threshold amount to $65,000. The trial court rejected defendant's argument that the jury should be instructed with the greater loss amount contained in the amended version. The jury specially found defendant caused losses in excess of $50,000 with regard to counts 1, 4, and 6. Based on those findings, the trial court imposed a one-year property loss enhancement to defendant's sentence for cargo theft (count 6), pursuant to section 12022.6.[4] It was undisputed that the cargo contained in Landeros's tractor-trailer was valued at $57,575.

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[4] The trial court struck the property loss enhancements for counts 1 and 4 in the interest of justice pursuant to section 1385.

Defendant contends he was entitled to the retroactive benefit of the amendment to section 12022.6, subdivision (a), which would mandate the one-year enhancement require proof that the loss exceeded $65,000. In support, defendant relies on the general rule from *In re Estrada* (1965) 63 Cal.2d 740, that "an amendatory statute lessening punishment is presumed to apply in all cases not yet reduced to final judgment as of the amendatory statute's effective date." (*People v. Floyd* (2003) 31 Cal.4th 179, 184.) Defendant's contention fails because it overlooks a well-established exception to the *Estrada* rule where, as here, the Legislature included a savings clause to express its clear intention that the amendment was to apply prospectively only—and *not* to ameliorate the penalty for criminals in defendant's circumstances.

As we have recognized, the *Estrada* principle favoring retroactive application of legislative amendments that benefit criminal defendants "'is based on presumed legislative intent.'" (*People v. Roberts* (1994) 24 Cal.App.4th 1462, 1465, quoting *People v. Figueroa* (1993) 20 Cal.App.4th 65, 70.) Therefore, the Legislature's inclusion of a contrary savings clause is determinative: "Where a criminal statute is amended to repeal another criminal statute, reduce the punishment for a criminal offense, or modify the elements of a penalty enhancement, an offender of the law that has been so amended is entitled to the benefit of the amendment *unless the Legislature indicates a contrary intent*." (*People v. Roberts*, *supra*, at p. 1465, emphasis added; see, e.g., *People v. Nasalga* (1996) 12 Cal.4th 784, 797 ["we adhere to the well-established principle that 'where the amendatory statute mitigates punishment *and there is no saving clause*, the rule is that the amendment will operate retroactively so that the lighter punishment is imposed'"], emphasis added.)

Our Supreme Court has instructed that the general rule in favor of retroactive operation to benefit a criminal defendant does not apply where the Legislature includes a saving clause, stating "that the act 'shall be applied prospectively'" or otherwise "'clearly signals its intent to make the amendment *prospective,* by the inclusion of an express saving clause or its equivalent.'" (*People v. Floyd*, *supra*, 31 Cal.4th at p. 185, quoting *People v. Nasalga*, *supra*, 12 Cal.4th at p. 793 (plur. opn. of Werdegar, J.), emphasis

added in *Floyd*.) Here, the prior version of section 12022.6 was made subject to a 10-year repeal date to permit the Legislature "to consider the effects of inflation on the additional terms imposed." (§ 12022.6, subd. (f).) Effective January 1, 2008, the Legislature amended the statute to modify the monetary thresholds, with the one-year threshold increasing to $65,000. (§ 12022.6, subd. (a)(1).)

In the process of amending the statute, the Legislature specified: "It is the intent of the Legislature that the amendments to Section 12022.6 of the Penal Code by this act apply prospectively only and shall not be interpreted to benefit any defendant who committed any crime or received any sentence before the effective date of this act." (Stats. 2007, ch. 420 (A.B. 1705), § 2.) Given such a straightforward pronouncement of legislative intent not to apply the amendment retroactively in defendant's circumstances, we must reject defendant's contention. (See *People v. Floyd*, *supra*, 31 Cal.4th at p. 185.)

DISPOSITION

The judgment is affirmed.

KRIEGLER, J.

We concur:

ARMSTRONG, Acting P. J.

MOSK, J.